

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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CLERK-ALBUQUERQUE

DON BARNES

Petitioner,

vs.

DAVID REHBEIN

Respondent,

Case No.

Judge:

CIVIL COMPLAINT FOR
RELIEF IN THE NATURE
OF MANDAMUS

CIV - 05 - 210 MV RHS

Introduction

1. This is an individual action for mandatory relief, authorized by 28 U.S.C. §1361, and Rule 81(b) of the Federal Rules of Civil Procedures for an order in the nature of a mandamus to be issued by this court directing David Rehbein, an employee of the Internal Revenue Service to produce a copy of the "Record of the Assessments," "Assessment list(s)," and the pertinent parts of assessment records in his possession or at his control.

Jurisdiction and Venue

2. Petitioner, Don Barnes is a Citizen of the state of New Mexico and is currently domiciled in San Juan county.

3. Respondent, David Rehbein is a revenue officer employed by the Internal Revenue Service at 800 East 30th St. Suite B, Farmington N.M. 87401. Respondent is being sued individually in his official capacity for purposes of 28 U.S.C §1361.

4. This court has original jurisdiction of the subject matter of this action pursuant to 28 U.S.C. §1361 regarding an action to compel an officer of the United States to perform a ministerial and non-discretionary duty owed to the Petitioner.

5. This court has supplemental jurisdiction to consider and rule on this mandamus petition pursuant to the All Writs Act, 28 U.S.C §1651.

6. Venue is proper in this district and this court pursuant to 28 U.S.C. §1391(e) (1) for the reasons that Respondent is residing in the State of New Mexico, Respondent is an employee of an agency of the United States, and Respondent is acting under color of legal authority.

Facts Relative to this Petition

7. On February 2, 2005, Petitioner received from the Respondent a demand letter effecting the collection of assumed tax liabilities.

8. Respondent, as an employee of the Internal Revenue Service, derives his authority for issuing the demand based upon a "Record of [the] Assessment," pursuant to 26 U.S.C. §6203, Title 26 CFR §301.6203-1 and *inter alia*, IRM Section 3.17.46.2.4(1).

9. Respondent's letter instructed timely compliance within thirty (30) days, or further adverse action would occur.

10. On February 4, 2005, Petitioner timely responded to Respondent's letter requesting a copy of the "Record of [the] Assessment" for the years 1997, 1999 and 2001, relative to the time span of the assumed tax liabilities.

11. Petitioner's authority to demand the Record of [the] Assessment(s) is in accordance with the general provisions contained in 26 U.S.C. §6203.

12. The non-discretionary and mandatory guidelines that Respondent must follow, as an operation of law, when a request for assessment records are received are contained in 26 U.S.C §6203, the implementing regulations at 26 CFR §301.6203-1, and 31 CFR Part 1, §2 Appendix B of Subpart C.

13. As of the date of this petition, Respondent is in direct contempt of Congress and the Secretary of the Treasury by refusing to produce the required document(s) Petitioner demanded despite clearly established law.

14. On February 23, 2005, Petitioner sent a notice of demand and refusal due to Respondent's refusal to produce valid Summary Record of [the] Assessment(s).

15. Petitioner has no administrative recourse available within the Internal Revenue Service to secure the requested document(s), and this petition does not concern a delay in agency action, or the agency as a whole, but a flat-out refusal of an employee to perform a non-discretionary and ministerial duty owed to Petitioner.

16. This writ of mandamus is to force a public official to perform a duty imposed upon him in his official capacity; it is not a suit against the sovereign when such officer's actions go beyond that imposed by law. "[W]hile the officer's powers are limited by statute; his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be

made the object of specific relief.” *Larson v. Domestic & Foreign Commerce Corp.* 337 U.S. 682, 689 (1949) and *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963).

17. The relief sought in this petition is not prohibitory or preventative and will not affect the Internal Revenue Laws, but would affect the individual Respondent and is therefore not a barrier to a mandamus, *Hawaii v. Gordon*, 373 U.S. 57.

Issues Presented

18. Whether the Respondent has a ministerial duty to produce a Record of [the] Assessment(s), Assessment list(s) and other pertinent parts of the record(s) when requested by the Petitioner?

Facts Necessary to Understand the Issues Presented by this Petition

19. Respondent is effecting the collection of assumed tax liabilities, and bases his authority upon liability and the amount disclosed on assessment records and other tax related documents in his possession or at his control.

20. Congress has clearly allowed access to information from the employee that is seeking collection. In this case, Petitioner can rely on 31 CFR Part 1, §2 Appendix B of Subpart C, reproduced here in part:

Individuals are advised that Internal Revenue Service procedures permit the examination of tax records during the course of an investigation, audit, or collection activity. Accordingly, individuals should contact the Internal Revenue Service employee conducting an audit or effecting the collection of tax liabilities to gain access to such records, rather than seeking access under the provisions of the Privacy Act. (Emphasis added)

21. Respondent is a person in connection with the revenue laws of the United States, and is an employee described in 31 CFR Part 1, §2 Appendix B of Subpart C and would therefore have access to the documents Petitioner seeks.

22. The following Internal Revenue Manual specifics that the authority for collection is the Record of [the] Assessment in order to be in compliance with 26 U.S.C §6203:

Individual Income Tax Assessments—Principle

(2) All principle assessments must be recorded on Summary Record of Assessments (Assessment Certificate). The Assessment Certificate is the legal document that permits collection activity. IRM 3.17.63.14.5 (10-01-2004)

Individual Income Tax Assessments—Penalty

(2) All penalty assessments must be recorded on Summary Record of Assessments (Assessment Certificate). The Assessment Certificate is the legal document that permits collection activity. IRM 3.17.63.14.6 (10-01-2004)

Individual Income Tax Assessments—Interest

(2) All interest assessments must be recorded on Summary Record of Assessments (Assessment Certificate). The Assessment Certificate is the legal document that permits collection activity. IRM 3.17.63.14.7 (10-01-2004)

23. Pursuant to Fed.R.Evid. 801(d)(2)(D), this is a party admission that a Summary Record of Assessment is the document that permits collection. In *United States v. Van Griffin*, 874 F.2d 634, 638 (9th Cir. 1989) the court held that government manuals are admissible as party admissions under Fed.R.Evid. 801(d)(2)(D).

24. Petitioner has no other adequate ordinary remedy at law. The plain intent of 31 CFR Part 1, §2 Appendix B of Subpart C coupled with 28 U.S.C. §1361 bypasses privacy act suits and allows complaints directly for writs of mandate when a clear duty is owed to the petitioner. The agency in this case is not responsible for failure to produce the documents as required by law, but the Respondent, in an act of insubordination, refuses to comply with the orders of the Secretary.

Reasons Why This Writ Should Issue

25. Mandamus relief is an appropriate remedy to compel an administrative agency to act where it has failed to perform a nondiscretionary, ministerial duty, *Marathon Oil Co. v. Lujan*, 937 F.2d 498 (10th Cir. 1991). "Mandamus relief is appropriate only when the person seeking such relief can show a duty owed to him by the government official to whom the writ is directed that is ministerial, clearly defined and peremptory." *Carpet, Linoleum and Resilient Tile Layers Local 419 v. Brown*, 656 F.2d 564, 566 (10th Cir.1981). Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as being so far ministerial that its performance may be compelled by mandamus, *Wilbur v. United States*, 281 U.S. 206, 218-19, 50 S.Ct. 320, 74 L.Ed. 809 (1930).

26. In *Hernandez-Avalos v. INS*, 50 F.3d 842, (10th Cir.1995). the court reviewed a three prong test to assist the court in determining the jurisdiction of a mandamus petition:

Thus, courts will exercise jurisdiction over a case such as this if the plaintiff has established (1) a clear duty owed to him or her by the agency; (2) a duty which is mandatory and not discretionary; and (3) a clear right to relief. *Hernandez-Avalos*, 50 F.3d at 844.

27. In 26 U.S.C. §6203, Congress mandated that a "Record of the Assessment" is available by simply requesting it:

"The assessment shall be made by recording the liability of the taxpayer in the office of the secretary in accordance with the rules or regulations prescribed by the secretary. Upon request of the taxpayer, the secretary shall furnish the taxpayer a copy of the record of the assessment." (Emphasis added)

28. "Shall" is mandatory, imposing a duty to record the tax liability and a duty to provide the Record of the Assessment upon request. The Supreme Court and the 10th circuit have made it

clear that when a statute uses the word "shall," Congress has imposed a mandatory duty upon the subject of the command, *United States v. Monsanto*, 491 U.S. 600, 607, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989).

29. The Implementing Regulations at 26 C.F.R., Section 301.6203-1 specify a minimum of five components, in addition to the Summary Record of the Assessment(s), that are to be supplied to the requester:

“The district director and the director of the regional service center shall appoint one or more assessment officers. The assessment shall be made by an assessment officer signing the summary record of the assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record.” (emphasis added)

30. The requirements in 26 U.S.C. §6203, and the implementing regulations at 26 C.F.R. §301.6203-1 is very clear and indisputable; there are no discretionary, or ambiguous terms in its statutory construction - production of the assessments and related documents are mandatory.

31. When 31 CFR Part 1, §2 Appendix B of Subpart C is tied with 26 U.S.C §6203 and 26 CFR §301.6203-1 the requirements are very clear; the Respondent is required by law to provide a copy of the “Summary Record of the Assessment(s),” “Supporting List,” and “pertinent parts of the record” that discloses the nature of the tax liability, identification of the taxpayer, amount of the assessment, and taxable period.

32. For purposes of clarity, the term “Secretary” in 26 U.S.C. §6203 is defined pursuant to 26 U.S.C §7701 (11) (B) as the Secretary of the Treasury or his delegate.

33. Pursuant to 26 U.S.C §7701(a)(12)(B), a delegate of the secretary is defined as an employee of the Internal Revenue Service when used in the context of carrying out the provisions [functions] of 26 U.S.C. §6203, and 31 CFR Part 1, §2 Appendix B of Subpart C.

34. The above authorities clearly indicate the Respondent is required to provide the documentation requested without question. Moreover, Petitioner has a clear right to seek a remedy for failure of the Respondent's neglect. Thus, the three-prong test of *Hernandez-Avalos* has been satisfied.

CLAIM FOR RELIEF

35. Petitioner requests that the United States District Court, District of New Mexico, issue an order in the nature of a mandamus to David Rehbein, employee of the Internal Revenue Service, and require him to produce procedurally correct copies of the document(s) identified as a "Record of the Assessment," for the years 1997, 1999 and 2001, that identify and pertain to the Petitioner, as required pursuant to Title 26 U.S.C. §6203.

36. Petitioner also requests that the United States District Court, District of New Mexico, issue an order in the nature of a mandamus to David Rehbein, employee of the Internal Revenue Service, and require him to produce the pertinent parts of the "Record of the Assessment" for the years 1997, 1999 and 2001 as required pursuant to Title 26 CFR §301.6203-1 that pertain to the Petitioner, including the mandatory requirements that disclose the following information: Amount of the assessment, Character of the liability assessed, Taxable period, and Identification of the Petitioner.

37. Petitioner also requests that the United States District Court, District of New Mexico, issue an order in the nature of a mandamus to David Rehbein, employee of the Internal Revenue Service, and require him to produce copies of the Assessment List(s) for the years 1997, 1999 and 2001 that pertain to the Petitioner as required pursuant to Title 26 CFR §301.6203-1.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Don Barnes", is written over a horizontal line.

Don Barnes
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